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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA COMMUNITY ACTION ON TOXICS and ALASKA CHAPTER OF THE SIERRA CLUB, Plaintiffs, vs. AURORA ENERGY SERVICES, LLC and ALASKA RAILROAD CORPORATION, Defendants.	Case No. 3:09-cv-00255-TMB **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FED. R. CIV. P. 56**

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INTRODUCTION

This action challenges permitting for the Seward Coal Loading Facility (the "Seward Terminal"). Essentially, Plaintiffs[1] object to the fact that the U.S. Environmental Protection Agency ("EPA") and the Alaska Department of Environmental Conservation ("DEC") (i) have permitted discharges of coal from the Seward Terminal under the Clean Water Act Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (the "General Permit") and (ii) have regulated air emissions under DEC's regulations that govern particulate emissions rather than under the Clean Water Act. Plaintiffs do not contend that Defendants have violated the General Permit. Rather, Plaintiffs maintain that (i) discharges from a conveyor and loader area covered by the General Permit require a separate, individual Clean Water Act permit, (ii) wind-blown dust governed by Alaska regulations must also have a Clean Water Act permit because some of this dust falls on surface waters, and (iii) an undocumented discharge of snow from an area permitted under the General Permit required a separate permit.

DEC and EPA reject Plaintiffs' permitting contentions. DEC, the current regulatory authority, states that no additional permit is required either for discharges from the conveyor/loader or for dust blown by the wind over nearby Resurrection Bay. Both DEC and EPA have repeatedly inspected the Seward Terminal and reviewed Plaintiffs' allegations in multiple contexts. Neither has ever cited Defendants for discharging without the Clean Water Act permit Plaintiffs believe is necessary.

Pursuant to FED. R. CIV. P. 56, Aurora Energy Services, LLC ("AES") and the Alaska Railroad Corporation ("ARRC") (together, "Defendants") hereby move the Court to grant judgment in favor of Defendants on all of Plaintiffs' claims.

First, insofar as Plaintiffs allege that coal sediment from the Seward Terminal conveyor systems constitutes an unpermitted discharge:

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[1] Alaska Community Action on Toxics is referred to as "ACAT" and the Alaska Chapter of the Sierra Club as the "Sierra Club." Together, these parties are referred to as "Plaintiffs."

- Such discharges are permitted under the terms of the General Permit and have been well-known to DEC and EPA. Thus the General Permit shields Defendants from citizen suit liability.
- DEC's and EPA's approach to permitting such discharges under the General Permit is entitled to judicial deference.
- Even if DEC and EPA were incorrect, Plaintiffs' claims constitute challenges to the permitting approaches DEC and EPA have taken, and as such, Plaintiffs must first pursue their administrative remedies-and petition the agency(ies) directly.
- This claim is moot, because an individual permit would require nothing different from the controls that Defendants are already required to implement under the General Permit.

Second, with respect to Plaintiffs' allegation that wind-borne dust emissions from the Seward Terminal coal piles require a permit under the Clean Water Act because they may, under certain unspecified conditions, land in Resurrection Bay:

- DEC does not regulate wind-borne dust under the Clean Water Act.
- EPA has never regulated wind-borne dust under the Clean Water Act.
- Windblown dust is not a Clean Water Act "point source," and classifying it as such would require virtually every source of air emissions to also obtain a water discharge permit.
- The existing General Permit and Stormwater Pollution Prevention Plan ("Stormwater Plan") provide enforceable Clean Water Act restrictions, and thus a permit "shield," with respect to dust discharges through stormwater.
- Plaintiffs' claims are moot because the emissions are already controlled and past violations have been penalized pursuant to an agreed compliance order entered into between Defendants and DEC.

Lastly, as to Plaintiffs' allegation that AES illegally plows snow containing coal dust from the loading dock into Resurrection Bay:

- Defendants do not plow snow from the loading dock into the water. Well before this action was filed, Defendants adopted a written policy prohibiting this activity.
- Any incidental discharge of coal-containing snow into Resurrection Bay would be covered by the General Permit.
- Plaintiffs have no basis to assert that coal-laden snow has been plowed into water after adoption of this policy.

Accordingly, Defendants respectfully ask that the Court grant summary judgment and dismiss this action with prejudice.

STATEMENT OF FACTS

The Seward Terminal

The Seward Terminal, located in Seward, Alaska, transfers coal from rail cars onto ocean-going vessels for shipment around the globe.[2] ARRC transports the coal from the Usibelli Coal Mine in Healy, Alaska to the Seward Terminal.[3] ARRC purchased the Seward Terminal in late 2003 and became involved with its management and operations in late 2006.[4] ARRC contracted with AES to operate and maintain the facility commencing on January 8, 2007.[5]

Regulation and Permitting of the Seward Terminal Under the Clean Water Act

In 1984, the initial owner of the Seward Terminal obtained an individual National Pollutant Discharge Elimination System permit from EPA, the agency with regulatory jurisdiction over the Seward Terminal's compliance the Clean Water Act at that time.[6] While the Seward Terminal operated under the individual permit, EPA conducted compliance inspections and was aware of the potential incidental discharges of coal and emissions of coal dust from the

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[2] Declaration of Shelli Knopik, Apr. 28, 2010 ("Knopik Decl.") (Docket #40-2), ¶ 3. The facility consists of five major components: (i) a railcar dumper facility; (ii) conveying systems to move coal from the railcar dumper to ships or the stockpile and to move coal from the stacker-reclaimer through a sampling station and onto the ship loader; (iii) the stacker-reclaimer; (iv) the stationary ship loader; and (v) various buildings. Declaration of Denise L. Ashbaugh in Support of Defendants' Motion for Summary Judgment ("Ashbaugh Decl.") Ex. K (Current Stormwater Plan) at 13-14, AESPROD00022807-08.

[3] Ashbaugh Decl., Ex. A (Seward Coal Loading Facility – Facility Facts); Declaration of Paul Farnsworth in Support of Defendants' Motion for Summary Judgment ("Farnsworth Decl."), ¶ 1.

[4] Farnsworth Decl., ¶ 1.

[5] *Id.*

[6] Ashbaugh Decl., Ex. Y (September 26, 1984 Individual Permit, number AK-004062-2). EPA delegated jurisdiction to DEC on October 31, 2009. *See* State Program Requirements; Approval of Application by Alaska To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Alaska, 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

site.[7] Indeed, in 1987, EPA conducted an inspection during which divers examined coal on the sea bed beneath the conveyor and loading dock.[8]

In 1999, EPA engaged in discussions with the prior owner/operator about changing the permitting of the facility from the individual permit to the General Permit.[9] EPA advised that there were two acceptable ways to permit discharges from the facility: (i) through the existing individual permit or (ii) using the General Permit.[10] EPA stated that while both options were appropriate, the General Permit would result in a lesser administrative burden "to both EPA and the facility."[11] EPA later confirmed that it preferred to use the General Permit to cover the Seward Terminal.[12] Per EPA's preference, in 2001, the prior owner applied for and received EPA approval for coverage under the General Permit.[13] EPA thereafter continued to oversee the Seward Terminal pursuant to the General Permit.[14]

In 2009, after AES became the operator of the Seward Terminal, EPA advised that:

> EPA continues to consider the AES Seward Loading Facility to be best classified under the requirements of the MSGP [General Permit] as Sector AD (i.e., *Storm Water Discharges Designated by the Director as Required Permits.*)[15]

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[7] *Id.*, Ex. B (May 1988 NPDES Compliance Inspection Report and May 1987 Dive Report and Plan).

[8] *Id.*, Ex. B at 5-6, SOA000667-668.

[9] Knopik Decl. (Docket #40-2), ¶ 6.

[10] Ashbaugh Decl., Ex. C (December 16, 1999 letter from EPA to Seward Terminal).

[11] *Id.*

[12] Knopik Decl. (Docket #40-2), ¶ 3.

[13] Ashbaugh Decl., Ex. D (February 9, 2011 letter from EPA to Seward Terminal).

[14] *See*, *e.g.*, Ashbaugh Decl., Ex. CC (Aug. 15, 2011 EPA Air Compliance Inspection Report); Ex. DD (Aug. 15, 2011 EPA Water Compliance Inspection Report); *see also* Declaration of Robert Brown in Support of Summary Judgment ("Brown Decl."), ¶ 12.

[15] *Id.*, Ex. G (April 5, 2009 letter from EPA to AES) (emphasis in original). Only the Director may assign a facility to Sector AD. Ashbaugh Decl., Ex. H (MSGP § 8.AD.1.1).

Following EPA's advice, AES filed a Notice of Intent to discharge pursuant to the General Permit.[16] EPA confirmed coverage under the General Permit and assigned AES Permit #AKR50CC38.[17]

Consistent with the requirements of the General Permit, AES operates the Seward Terminal pursuant to its Stormwater Plan, which was provided to EPA before coverage was effective in June 2009 and later to DEC. The current Stormwater Plan incorporates various control measures including settling ponds, designated outfalls, grading to minimize off-site flow, drip pans, and good housekeeping practices to minimize potential discharge of pollutants via stormwater.[18] The Stormwater Plan also separates the Seward Terminal into eight Drainage Areas.[19] One Drainage Area is Drainage H, which discharges directly into Resurrection Bay.[20]

Drainage Area H consists of the "[c]onveyor over water and shiploader" and addresses, among other things, coal sediment and carryback from the conveyor.[21] It also features five structural controls to minimize coal sediment in the Bay: (i) a covered conveyor; (ii) multiple wipers on the conveyor belt to reduce coal carry back on the return belt; (iii) chute modifications to reduce coal spillage; (iv) seal replacement to minimize coal spillage from the sides of the belt; and (v) drip pans located under the conveyor to collect carryback coal from the return belt.[22] The Seward Terminal dock is also covered through the Stormwater Plan.[23] Best management practices have been implemented for all Drainage areas, including best management practices

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[16] *Id.*, Ex. E (Notice of Intent to Discharge).

[17] *Id.*, Ex. F (Notice of Intent to Discharge Acknowledgment).

[18] *Id.*, Ex. K (Updated Stormwater Plan) at 24-33, AESPROD00022818-27.

[19] *Id.* Ex. K (Updated Stormwater Plan) at 15-17, AESPROD00022809-11.

[20] *Id.*

[21] *Id.*, *see also,* Ex. L (Sierra Club Dep.) at 30:14 – 31:11.

[22] *Id.*, Ex. K (Updated Stormwater Plan) at 15-17, 26, 28; AESPROD00022809-11, AESPROD00022820, AESPROD00022822.

[23] *Id.*, Ex. K (Updated Stormwater Plan); Ex. L (Sierra Club Dep.) at 30:14 – 31:11. Some of these best management practices are outlined below.

that minimize dust generation and its subsequent discharge through stormwater.[24]

On October 31, 2009, DEC took over regulation of the federal stormwater discharge program.[25] As part of this transition, control of the General Permit was transferred to DEC.[26] Consistent with EPA's position, DEC has authority to decide whether to authorize discharges from the Seward Terminal under the General Permit or an individual permit, and decided to continue to regulate the Seward Terminal under the General Permit.[27] Neither the General Permit nor an Individual Permit, has a zero discharge requirement.[28]

DEC continues to take the position that the General Permit is the proper permit for the Seward Terminal and that a separate individual permit is not required for coal discharges and that dust emissions are regulated by the state's air program.[29] Defendants' experts agree with that assessment, as does Plaintiffs' own expert.[30] Plaintiffs' expert testified under oath that he was unaware of any similar facility that required a Clean Water Act permit for comparable fugitive dust emissions.[31] Instead, as DEC states, requiring an individual permit in addition to the General Permit would be "duplicative and needlessly cumbersome, and would provide no

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[24] *Id.* Ex. K (Updated Stormwater Plan) at 24-32, AESPROD00022818-26.

[25] Declaration of Lynn J. Tomich Kent ("Kent Decl."), ¶ 3; *see* 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

[26] Kent Decl., ¶ 4.

[27] *Id.* DEC's decision to continue coverage for the Seward Terminal by the General Permit and the Stormwater Plan is consistent with coverage at other facilities for similar discharges. Ashbaugh Decl., Ex. V (Alongi Report).

[28] Kent Decl., ¶ 10; *see* Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64763 (Oct. 30, 2000)

[29] Kent Decl., ¶ 11.

[30] Ashbaugh Decl. Ex. N (Klafka Dep.) at 132:11-16; Ex. V (Alongi Report); Declaration of Kirk Winges ("Winges Decl."), ¶ 3.

[31] *Id.*, Ex. N (Klafka Dep.) at 132:11-16. (Q: Are you aware of even one facility where fugitive air emissions that made their way into the air, traveled for a distance, fell to a surface water were in fact regulated by Clean Water Act NPDES permit? A: Not that I can recall.).

additional environmental benefit or protection."[32]

Regulation and Permitting of the Seward Terminal Under the Clean Air Act and State Regulations.

In December 1998, EPA informed the prior owner/operator that it was required to submit an operating permit.[33] In 2004, ARRC reassessed EPA's determination and wrote EPA requesting another decision regarding whether it was required to have an air permit pursuant to the Clean Air Act.[34] On August 24, 2004, EPA responded noting that because the Seward Terminal did not conduct any coal preparation processes, the facility was not required to have an air permit.[35] As a result the prior air permit was rescinded.[36]

The DEC Division of Air Quality regulates emissions of coal dust (and other particulate matter) at the Seward Terminal through 18 AAC 50.045(d) and 50.110.[37] Neither regulation requires the Seward Terminal to cease all dust emissions, but instead requires that AES take "reasonable precautions to prevent particulate matter from being emitted into the ambient air."[38] DEC is well aware of the issue of windblown dust emissions from the Seward Terminal as a

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[32] Kent Decl., ¶ 12.

[33] Ashbaugh Decl., Ex. O (December 16, 1998 letter from EPA to DEC).

[34] *Id.*, Ex. P (May 5, 2004 ARRC letter to EPA).

[35] *Id.*, Ex. Q (August 11, 2004 EPA letter to ARRC). EPA confirmed this decision in 2011. *Id.*, Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report).

[36] *Id.*, Ex. R at 3, ARRC00010144 (Expansion of Seward Loading Facility Stockpile Area Frequently Asked Questions and Answers).

[37] Declaration of Alice Edwards ("Edwards Decl.") at ¶¶ 7, 8; Ashbaugh Decl., Ex. S (December 13, 2006 EPA letter to Sen. Stevens) (affirming that ADEC, not EPA, is the primary air pollution permitting authority in Alaska). Plaintiffs' expert agrees that the emission of coal dust is governed by air regulations. Ashbaugh Decl., Ex. N (Klafka Dep.) at 21:12-16; 134:3-12.

[38] Ashbaugh Decl., Ex. S at 2, ARRC00000135 (Dec. 13, 2006 letter from EPA to Sen. Stevens); *see also* 18 AAC 50.045(d). Plaintiffs' expert acknowledges that in fact there is no system that could completely eliminate discharges into Resurrection Bay. Ashbaugh Decl., Ex. N (Klafka Dep.) at 13:13-17.

result of public input and inspections conducted by DEC personnel.[39] In fact, Plaintiffs' primary fact witness testified that he contacts DEC on approximately a weekly basis regarding the Seward Terminal.[40]

In 2007 and 2008, based on events occurring at the Seward Terminal, DEC issued two Notices of Violations ("NOVs") to Defendants pursuant to Alaska's clean air regulations regarding the emission of wind-borne dust from the Seward Terminal.[41] In May 2010, DEC and Defendants resolved the NOVs by entering into a Compliance Order by Consent ("Compliance Order").[42] The Compliance Order was designed to memorialize the implementation of appropriate control measures, including standard operating procedures for airborne dust emissions; and provide an ongoing mechanism for oversight and enforcement of those controls at the Seward Terminal.[43] DEC's position is that the standard operating procedures, control mechanisms, and other requirements of the Compliance Order establish reasonable precautions for airborne dust emissions from the Seward Terminal; protect human health and the environment; and therefore comply with applicable law governing airborne dust emissions from the facility.[44] The Compliance Order also assessed a civil penalty, the amount of which "represents the reasonable compensation to the State for the alleged violations; the economic benefit or savings realized by ARRC by delaying installation of appropriate coal dust emission controls; and an assessment of the gravity of the alleged violations[.]"[45]

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[39] Ashbaugh Decl., Ex. EE (Emails from Wally Evans to Defendants, dated November 23, 2010 ; May 11, 2011 ; and November 18, 2011), ARRC00011462, ARRC0030983, ARRC00023104-23105.

[40] *Id.*, Ex. J (Maddox Dep. at 132:24-133:1) ("[H]ardly a week goes past that I don't talk to [DEC] on the phone or email them.").

[41] Edwards Decl., ¶ 9.

[42] *Id.*, ¶ 10.

[43] *Id.*

[44] *Id.*, ¶ 11; Ashbaugh Decl., Ex. T (Compliance Order).

[45] Ashbaugh Decl., Ex. T (Compliance Order at ¶ 31).

As recognized by DEC, Defendants have adopted the procedures and control mechanisms mandated by the Compliance Order.[46] Defendants have paid all penalties associated with the Compliance Order, implemented standard operating procedures, completed all Supplemental Environmental Projects required by the Compliance Order, and have abided by the Compliance Order with no pending disputes or enforcement actions.[47] As such, the Compliance Order terminated on March 3, 2012 by operation of its own terms.[48]

Defendants' Ongoing Commitment to the Environment

Since ARRC became involved in management and operations at the Seward Terminal in late 2006 and AES took over operations at the facility in 2007, they have implemented systematic and continuous improvements to both operating procedures and equipment. Such improvements include, but are not limited to, the following:

- Institution and documentation of comprehensive standard operating procedures designed to minimize discharges of coal or emissions of coal dust;
- Installation of a custom-designed chute on the shiploader;
- Installation of water fogging and/or spray bars at the train unloading building, the start of conveyer belt BC-11, the transfer point along BC-13 and on the stacker/reclaimer unit;
- Installation of heat tracing spray bars on the train unloading building for winter operations;
- Installation of water spray bars at the junction of BC-11 and BC-12;
- Installation of drip pans to catch any carryback from the conveyor located above Resurrection Bay;
- Installation of water cannons at more than a dozen locations along the outer edges of the east and west coal piles;
- Sealing of chutes and transfer points along the conveyor;
- Addition of moisture to the inside of the chute between the trailer conveyor and the boom conveyor;

[46] Edwards Decl., ¶ 13.

[47] *Id.*, Ex. T (Compliance Order)

[48] *Id.*

- Installation and use of scrapers/wipers to prevent coal buildup on the conveyor belt;
- Replacement of certain conveyor covers;
- Use of replaceable filter cloth and drainage rocks that are reconfigured annually or as needed at stormwater outfalls;
- Ensuring that coal stockpiles are aligned in the direction of the prevailing winds to minimize exposed surface area and wind angle, which helps reduce dust generation;
- Removing snow removal piles from the dock and placing them at locations to prevent or minimize stormwater contamination; and
- Developing and enforcing a policy that explicitly forbids coal from being plowed into Resurrection Bay.[49]

Defendants follow specific standard operating procedures and practices ("Standard Operating Procedures") to minimize any stormwater discharges or air emissions at the Seward Terminal.[50] For example, grading, berming or curbing are used to prevent runoff of potentially contaminated flows and divert run-on away from the facility and when dust control sprinklers are used to suppress dust on the coal stockpiles, the minimum amount of water necessary is used in order to minimize coal pile runoff.[51] The Standard Operating Procedures also provide for regular, ongoing observations regarding any potential dust emissions and require the shutdown of operations if dust emissions are seen leaving the facility property or cannot otherwise be

[49] *Id.*, Ex. K (Updated Stormwater Plan); W (Supplemental Environmental Projects); X (Standard Operating Procedures). Three of the listed improvements (spray bars on BC 1-10; fogger on the stacker/reclaimer; sealed chute and foggers on train and boom conveyors of stacker/reclaimer) were installed pursuant to the Compliance Order. *Id.,* Ex. T (Compliance Order), W (Supplemental Environmental Projects).

[50] *Id.* Ex. K (Current Stormwater Plan), Ex. X (Standard Operating Procedures). Even though the Compliance Order terminated under its own terms on May 3, 2012, AES will continue to follow the Standard Operating Procedures mandated under that Order. Brown Decl., ¶ 10 ("The Seward Terminal maintains detailed records of the facility's compliance with the Standard Operating Procedures for addressing dust …. These Standard Operating Procedures provide a comprehensive means of addressing dust at the facility.").

[51] *Id.*, Ex. K (Current Stormwater Plan) at 24-25, AESPROD00022818-19.

controlled.[52] Employees are trained to use a modified EPA Method 22 to evaluate dust generation and to manage the facility to reduce potential emissions.[53] Additionally, Defendants maintain detailed records at the Seward Terminal verifying that these procedures are followed.[54]

The Seward Terminal has also implemented good housekeeping measures that hold each employee accountable for pollution prevention when conducting regular work activities. These measures include, but are not limited to, requiring employees to remove snow from the loading dock and place it at an appropriate location on the facility's property; properly cleaning the drip plans to minimize stormwater carryback that could discharge to Resurrection Bay; and prohibiting the intentional placement of any coal material into Resurrection Bay.[55] Moreover, Defendants document and investigate any complaints they receive regarding coal dust. [56] If a complaint is corroborated, AES takes prompt corrective action to address it.[57] If a complaint is found to be invalid, AES will nonetheless document why it was unable to corroborate it.[58]

DEC and EPA Inspections

Since 2008, DEC and EPA have conducted air and water regulatory inspections of the Seward Terminal. Both agencies have concluded that the facility is in compliance with applicable law.

On February 1-2, 2010, DEC Water Division inspected the facility.[59] In DEC's inspection report, the agency described the purpose of the inspection: "This inspection focused

[52] *Id.*, Ex. X (Standard Operating Procedures) at 4, ARRC00001478.

[53] *Id.*

[54] Brown Decl., ¶ 10.

[55] Ashbaugh Decl., Ex. AA (Seward Coal Terminal Policy on Coal); Declaration of Victor Stoltz in Support of Summary Judgment ("Stoltz Decl."), ¶ 11.

[56] *Id.*; Ashbaugh Decl., Ex. X (Standard Operating Procedure); Farnsworth Decl., ¶¶ 6-7. Under the Compliance Order, this process has included disclosing the complaint to DEC and providing DEC with the results of AES's investigation. Ashbaugh Decl., Ex. T (Compliance Order) at 10-11, ARRC00012318-19.

[57] Ashbaugh Decl., Ex. X (Standard Operating Procedures) at 6, ARRC00001480.

[58] *Id.*

[59] *Id.*, Ex. BB (February 19, 2010 APDES Inspection Report).

on the review of AES[']s] on-site [Stormwater Plan] and the implementation of this plan at the facility."[60] DEC's record review analyzed the Stormwater Plan and related materials, including the General Permit and Authorizations, and correspondence with EPA on those issues.[61] DEC noted that in September 2009 – prior to Plaintiffs' 60-day notice of this action – the Seward Terminal's Stormwater Plan had been revised to, among other things, address dust generation and coal belt conveyor issues.[62]

DEC's physical inspection of the facility focused on incidental discharges of coal and emissions of coal dust from the area of the conveyor and the practices that had been implemented under the Stormwater Plan to minimize these discharges and emissions.[63] DEC observed that "scrapers were being employed to remove coal dust from sections of belt conveyor in various locations."[64] DEC reported that "[n]o visible dust was being generated at the end of the loading process and no coal debris was observed falling into the Bay.[65] DEC further observed that:

> [c]oal dust and chunks had accumulated on the dock below the ship loader and the conveyor catwalk near the ship loader (Images 28-29). No chunks of coal were observed falling into the water but flakes of 'carry-back' (congealed coal dust) were observed falling from the conveyor near the ship loader, and from the ship loader itself, into the Bay (Image 31). No visible dust was being generated at the end of the ship loading process, but dust was visible on the ship's deck and hold cover (Image 33).[66]

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[60] *Id.* at 3.

[61] *Id.* at 4.

[62] *Id.* at 3. The Stormwater Plan has since been further amended to, among other things, set forth additional improvements that have occurred at the Seward Terminal including the installation of the drip pans. *Id.*, Ex. K (Current Stormwater Plan).

[63] *Id.*, Ex. BB (February 19, 2010 APDES Inspection Report).

[64] *Id.*

[65] *Id.* at 43.

[66] *Id.*

DEC inspected the area "just south of the south end of the facility, below the belt conveyor leading out to the ship" and observed that "at low tide[,] no dust or coal was observed on the beach, and no coal or coal debris was observed falling from the conveyor (Images 34 & 35)."[67]

On August 15, 2011, EPA conducted a full site inspection of the Seward Terminal regarding its compliance with the Clean Water Act and the Clean Air Act.[68] EPA observed that the Seward Terminal was operating as expected and pursuant to the existing General Permit.[69] The EPA Air Compliance Report noted that the facility has "undertaken a comprehensive approach to controlling dust from coal storage and handling."[70] The EPA Clean Water Act Compliance report indicated that the inspector "did not see any other areas of concern during this inspection" other than a small hole in a silt fence.[71] Neither inspector suggested that an individual permit was required.[72]

Plaintiffs' Clean Water Act Lawsuit

On October 28, 2009, Plaintiffs served Defendants with a Notice of Violations and Intent to File Suit.[73] Thereafter, Plaintiffs filed this citizen suit alleging violations of sections 301 and 402 of the Clean Water Act.[74] In their Complaint, Plaintiffs allege that Defendants have violated the Clean Water Act by discharging "coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water" into Resurrection Bay and adjacent waters without the necessary

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[67] *Id.*

[68] Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report) at 1, ACAT003328.

[69] Brown Decl.,¶ 13.

[70] Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report) at 8, ACAT003335.

[71] *Id.*, Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report) at 8, AESPROD00022603.

[72] *Id.*

[73] *Id.*, Ex. GG (Notice of Intent to Sue).

[74] Docket #1 (Comp., ¶ 2).

permit.[75] Specifically, Plaintiffs allege that three different types of discharges or emissions require individual permit authorization: (i) discharges during the "transfer and loading of coal onto vessels via the [Seward Terminal] conveyor systems"; (ii) emissions resulting from wind dispersion of "coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water" from the "[Seward Terminal] stockpiles, railcar dumping facility, stacker-reclaimer, ship loader, and the conveyor systems"; and (iii) discharges due to the plowing of "coal-contaminated snow … directly into Resurrection Bay or adjacent wetlands or ponds."[76] Plaintiffs seek declaratory and injunctive relief but do not claim any damages.[77] Plaintiffs do *not* claim that Defendants have violated any part of their existing General Permit, but rather claim solely that an additional permit is required.[78]

On May 3, 2010, Defendants moved for judgment on the pleadings.[79] On January 10, 2011, this Court granted Defendants' motion in part and denied it in part.[80] During the ensuing discovery period, the parties exchanged 64,966 pages of documents and five (5) expert reports, and conducted eight (8) fact depositions and one expert deposition.[81] Defendants now move for summary judgment on each of Plaintiffs' claims.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is "not a disfavored procedural shortcut," but is instead one of the "principal tools by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private

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[75] *Id.*, ¶¶ 48-75.
[76] *Id.*
[77] Ashbaugh Decl., Ex. II (April 13, 2010 Plaintiffs' Initial Disclosures).
[78] *Id.*, Ex. L (Sierra Club Dep.) at 23:14-17; HH (ACAT Dep.) at 25:17-21.
[79] Docket # 40, 41.
[80] Docket # 56.
[81] Ashbaugh Decl., ¶ 2.

resources."[82] A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.[83] Material facts are those that might affect the outcome of the case.[84] A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party.[85]

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact."[86] This means that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts."[87] Nor may the nonmoving party rely on the mere allegations in the pleadings, but instead "must set forth specific facts showing that there is a genuine issue for trial."[88] Plaintiffs cannot satisfy their burden, and summary judgment should be granted.

II. COAL SEDIMENT FROM THE CONVEYOR IS A PERMITTED DISCHARGE THAT PLAINTIFFS CANNOT CHALLENGE.

Plaintiffs' first claim is solely a complaint about the way EPA and DEC have chosen to permit coal sediment discharges from the Seward Terminal's conveyor. Plaintiffs object because DEC "does not require, and has no current plans to require, a separate, individual NPDES/APDES permit for [the Seward Terminal conveyor] discharges."[89] Summary judgment on Plaintiffs' first claim is appropriate because (i) the Clean Water Act shields a permittee from liability for the agencies' permitting approaches; (ii) Plaintiffs were required to petition DEC if

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[82] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).
[83] FED. R. CIV. P. 56(a); *see also Celotex*, 477 U.S. at 322-23.
[84] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[85] *Id.*
[86] *Id.* at 247-48.
[87] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted).
[88] *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005) (citation omitted).
[89] Kent Decl. at ¶ 12.

they wished to challenge its approach; and (iii) Plaintiffs' claim for injunctive relief is moot because what Plaintiffs seek is now required—and has been implemented—under the General Permit.

A. The Clean Water Act Shields AES and ARRC from Liability Because the Discharges at Issue Are Permitted.

The Clean Water Act explicitly precludes any liability for a permitted discharge:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and ***1365*** of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title[.][90]

There is no dispute that the Seward Terminal is permitted under the General Permit pursuant to section 1342, or that Plaintiffs brought this action pursuant to section 1365.[91] Nor is there any dispute that Defendants are in compliance with the General Permit.[92] Rather, Plaintiffs' sole argument is that EPA and now DEC should not regulate coal sediment discharged from the conveyor using the General Permit.[93] Because this discharge is plainly within what is permitted and because the regulatory agencies were well aware of the discharge, the Clean Water Act shields Defendants from an attack on the agencies' permitting choices.[94]

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[90] 33 U.S.C. § 1342(k) (emphasis added).

[91] Compl. at ¶ 2 (Docket # 1).

[92] Both Plaintiffs, in their Rule 30(b)(6) depositions, specifically testified that they do *not* contend that Defendants have violated the permit for this facility. *See* Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 23:14-17; Ex. HH (ACAT Dep.) at 25:17-21.

[93] Setting aside the permit shield provisions of the statute, DEC plainly has discretion to cover coal sediment within the General Permit. *See* 40 C.F.R. § 122.28(a)(2). In any event, any facial challenge to the General Permit must be made to DEC, as discussed in Section II(C), *infra.*

[94] *See Coon ex rel. Coon v. Willet Dairy, LP,* 536 F.3d 171, 173 (2d Cir. 2008) ("[C]ompliance with an authorized permit is deemed compliance with [the Clean Water Act], so as long as [the permittee] was acting in accordance with its permit it could not be liable in a citizen suit for CWA violations").

1. The General Permit Covers Coal Sediment Discharges from the Conveyor.

Coal sediment discharges from the conveyor are covered under the General Permit. The Stormwater Plan, which "implements the [General Permit]" and constitutes "an enforceable permit requirement,"[95] expressly governs coal discharged from this part of the facility. The Deputy Commissioner of DEC, Lynn Kent, specifically notes that Table 2 of the Stormwater Plan "lists all 'outfalls and drainages' including 'Area H' comprising the 'conveyor over water and shiploader.'"[96] The Sierra Club agrees.[97] Section 3.5 of the Stormwater Plan, "Erosion and Sediment Controls," "includes the conveyor over Resurrection Bay and lists the controls that are required by the [Stormwater Plan] (i.e., a cover, a belt scraper system, and proper maintenance)."[98] Moreover, the Stormwater Plan has been revised over time to reflect additional controls intended to minimize the buildup of coal in that drainage area relating to possible discharges from the conveyor, including chute modifications, seal replacements on the conveyor, and drip pans to catch carryback coal sediment.[99] Thus, coal sediment discharges are specifically contemplated, and efforts to minimize such discharges are incorporated, in the permitting documents.

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[95] Kent Decl., ¶ 7. The General Permit incorporates AES's Stormwater Plan, which "is intended to document the selection, design, and installation of control measures." Ashbaugh Decl., Ex. M (General Permit) at 30, ARRC00018765.

[96] Kent Decl., ¶ 8, referencing Ashbaugh Decl., Ex. I (Stormwater Plan) at 11, ARRC00001913.

[97] Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 30:10-23, 31:8-11 (Q: [H]aving read the [Stormwater Plan], wouldn't you say that Area H includes the conveyor and the loading dock? A: Yes.).

[98] Kent Decl., ¶ 7, referencing Ashbaugh Decl., Ex. I (Stormwater Plan) at 20, ARRC00001922.

[99] *See id.* (Stormwater Plan) at 19-20, ARRC00001921-22. The Stormwater Plan was most recently revised in May 2011. *See generally* Ashbaugh Decl., Ex. K (Current Stormwater Plan).

2. The Regulatory Agencies Recognize That the Conveyor is Covered Under the General Permit.

DEC also recognizes that "the [Stormwater Plan] for the Seward Terminal specifically covers discharges of coal from the shiploader and conveyor over water."[100] Deputy Commissioner Kent explains that when she directed the Division of Water, no "separate NPDES/APDES permit (general or individual), aside from the [General Permit], was required for ***coal discharges*** or fugitive dust emissions" and that "for purposes of the NPDES/APDES program under the CWA, no other permit, other than the [General Permit], is required."[101] Deputy Commissioner Kent also states, "[DEC] does not require, and has no current plans to require, a separate, individual NPDES/APDES permit for these discharges."[102]

In April 2009, EPA provided to AES a letter, the purpose of which was "to respond to your request of March 17, 2009, that the U.S. Environmental Protection Agency provide written permission for the Aurora Energy Services (AES) Seward Loading Facility to renew its permit coverage under [the General Permit]."[103] EPA authorized AES to "submit a Notice of Intent to renew its permit coverage under [the General Permit] . . . ."[104] During May, 2009, AES provided EPA with a copy of the Stormwater Plan. On May 15, 2009, EPA expressly authorized coverage under the General Permit. That coverage became effective on June 14, 2009, following a 30-day waiting period.[105]

In addition, DEC's many regulatory activities since EPA's 2009 renewal of the General Permit confirm that coal sediment discharges from the conveyor are within the scope of the

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[100] Kent Decl., ¶ 8.

[101] Kent Decl., ¶ 11 (emphasis added).

[102] *Id.* at ¶ 12.

[103] Ashbaugh Decl., Ex. G at 1 (April 9, 2009 letter from EPA to AES).

[104] *Id.*

[105] Declaration of Bartly Kleven in Support of Motion for Summary Judgment ("Kleven Decl."), ¶ 4**;** *see also* Ashbaugh Decl., Ex. F (May 15, 2009 letter from EPA to Aurora Energy Services, LLC). The permit was assigned a tracking number and added to the EPA website that documents coverage under this General Permit.

Seward Terminal's coverage under the General Permit. DEC has undertaken various inquiries and facility inspections—both routinely and in response to the complaints of Russell Maddox, a member of both Plaintiffs and their primary fact witness. For example, DEC personnel "visited the Seward Terminal to conduct an inspection in February 2010 to observe conditions at the facility and in the area."[106] Following this inspection and its review of the General Permit, the Stormwater Plan, and related correspondence, DEC identified the very same discharges that are the subject of the Complaint's first claim.[107] Yet DEC did *not* cite AES for a discharge without a permit.[108] Similarly, although EPA has conducted inspections of the Seward Terminal, it has never suggested that the facility is discharging without a permit.[109]

Finally, Plaintiffs sent both DEC and EPA their Clean Water Act notice of intent letter. Neither agency disavowed or questioned any prior permitting decision relating to the Seward Terminal. Rather, DEC directly rejects Plaintiffs' position.[110] Hence, the record before the Court uniformly demonstrates that neither DEC nor EPA require a separate, individual Clean Water Act permit for any coal sediment discharges from the Seward Terminal.

3. Even If Coal Sediment From the Conveyor Had Not Been Identified in the Permit, Defendants Are Shielded From Liability Because EPA and DEC Were Well Aware of This Discharge.

Even assuming *arguendo* that the alleged discharge of coal sediment was not expressly covered by the General Permit, no liability can attach because the regulatory agencies reasonably anticipated this discharge would occur. Courts have interpreted Section 1342(k) to shield permittees from claims relating to discharges which are not listed in a permit so long as these discharges have been "reasonably anticipated by, or within the reasonable contemplation of, the

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[106] Kent Decl., ¶ 5

[107] Ashbaugh Decl., Ex. BB (February 19, 2010 APDES Inspection Report).

[108] *Id.*

[109] *See generally, e.g.,* Ashbaugh Decl., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report) (detailing facility operations and controls without identifying any violations or permitting issues).

[110] *See generally* Kent Decl.

permitting authority . . . during the permit application process."[111] Said otherwise, discharges that have been "adequately disclosed to the permitting authority" cannot be the subject of Plaintiffs' action.[112]

EPA has known about discharges of coal sediment from the conveyor for at least 25 years. A 1987 Dive Report demonstrates that EPA knew of these discharges and found them acceptable under the permit in place for the facility at the time.[113] The next year, an EPA compliance inspection of a previous operator of the Seward Terminal determined that wet coal can fall from the conveyor, but noted that the facility nevertheless was in compliance with its permit.[114] EPA thus had full knowledge of coal sediment discharges from the conveyor in 1999, when it advised the prior operator that "discharge from the facility may be regulated under either an individual NPDES permit (such as the one that you have now) or under the General NPDES permit for storm water[.]"[115] Moreover, AES provided EPA with the text of the Stormwater Plan, with its explicit references to coal discharges, in May 2009, prior to the effective date of continued coverage under the General Permit.[116]

As noted above, DEC was aware of coal sediment discharges during its various inspections and found no violation.[117] Thus, both because the permit expressly covers coal sediment discharges and because DEC and EPA have full knowledge of these discharges, Defendants are shielded from liability on Plaintiffs' first claim.

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[111] *Piney Run Pres. Assoc. v. County Comm'rs,* 268 F.3d 255, 268 (4th Cir. 2001).

[112] *Id.* at 269.

[113] *See* Ashbaugh Decl., Ex. B (May 1988 NPDES Compliance Inspection Report and May 1987 Dive Report and Plan) at 5-6, SOA000667-668.

[114] *See id*. at 1, 3; SOA00663, SOA00665.

[115] *See* Ashbaugh Decl., Ex. C (December 16, 2009 letter from EPA to Seward Terminal, Inc.); Knopik Decl., ¶ 6 and Attachment 1 (Docket #40-2, 40-3).

[116] *See* Kleven Decl., ¶ 5.

[117] Ashbaugh Decl., Ex. BB (February 19, 2010 APDES Inspection Report).

B. The Regulatory Agencies' Permitting Approach and Interpretation of the General Permit for the Seward Terminal are Entitled to Deference.

A regulatory agency is entitled to broad deference in both its permitting approaches and its interpretations of issued permits.[118] Indeed, permits are set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[119] Courts have consistently granted wide deference to a permitting agency's interpretation of a Clean Water Act permit.[120] Based on prior inspections, responses to complaints, and past regulatory decisions (including a decision not to take enforcement action after receiving notice of the instant case), both EPA and DEC have recognized that stormwater discharges from the Seward Terminal, including discharges of coal sediment from the conveyor and shiploader, are properly covered by the General Permit.[121] Both agencies had ample basis for this permitting approach. Thus, even setting aside the shield from liability afforded to a permittee, EPA and DEC are entitled to deference because Plaintiffs are unable to demonstrate that the agencies' choice to regulate under

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[118] *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) ("Congress has vested in the Administrator broad discretion to establish conditions for NPDES permits.").

[119] *Citizens for Clean Air v. United States E.P.A.*, 959 F.2d 839, 844 (9th Cir. 1992).

[120] *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *see also California Pub. Interest Research Group v. Shell Oil Co.*, 840 F. Supp. 712, 718 (N.D. Cal. 1993) (finding local water board's interpretation of NPDES permit "reasonable, given both the language and underlying purpose of the permit"); *Student Pub. Interest Research Grp. of New Jersey, Inc. v. Am. Cyanamid Co.,* 1985 U.S. Dist. LEXIS 14113 (D.N.J. Nov. 6, 1985) (adopting "rational" agency interpretation of NPDES permit); *Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 20 F. Supp. 2d 700, 709 (D. Del. 1998) aff'd, 182 F.3d 904 (3d Cir. 1999) ("In construing a permit provision, the Court should defer to the interpretation of the agency charged with enforcement of the terms."); *Student Pub. Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, Civ. 83-3262, 1986 WL 6380 (D.N.J. Feb. 28, 1986) (holding that "EPA's interpretation of the permit is entitled to deference and must be upheld as it is not arbitrary or unreasonable"); *In re Freshwater Wetlands Prot. Act Rules*, 798 A.2d 634, 643 (N.J. Super. Ct. App. Div. 2002) aff'd, 852 A.2d 167 (N.J. 2004) (finding that "deference is accorded to the EPA's interpretation" of its permit); *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency*, 660 N.W.2d 427, 438 (Minn. Ct. App. 2003) (according agency's interpretation of stormwater permit "a presumption of correctness").

[121] Kent Decl., ¶¶ 11-12; Ashbaugh Decl., Ex. G (April 6, 2009 letter from EPA to AES).

a general stormwater permit is arbitrary or unreasonable. It follows that this Court should not second-guess EPA's and DEC's choices to cover this discharge in the General Permit.

C. Plaintiffs Were Required to Petition EPA Before Seeking Judicial Review of the General Permit.

Courts have long recognized that where an administrative remedy is available, a party must avail itself of that remedy before bringing an action to a court.[122] This principle is essential to achieve the well-recognized mandate that an agency must always be given the opportunity to address the arguments of litigants prior to review by a court.[123] Notably, in the Clean Water Act context, a citizen plaintiff who neglected to present arguments during an agency's permit proceedings "may not [later] use the vehicle of the [Clean Water Act's] citizen suit provisions to challenge [a permittee's] discharge of pollutants . . . without an NPDES permit."[124]

Here, Plaintiffs had a clearly defined regulatory path by which they should have objected to EPA's choice to permit this facility under the General Permit. EPA's regulation at 40 C.F.R. § 122.28(b)(3)(i) provides: "The Director[125] may require any discharger authorized by a general permit to apply for and obtain an individual NPDES permit. ***Any interested person may petition the Director to take action under this paragraph***."[126] The General Permit also states that an "interested person" may petition EPA to require coverage under an individual permit.[127]

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[122] *See, e.g.*, *Huang v. Ashcroft,* 390 F.3d 1118 (9th Cir. 2004).

[123] *See, e.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) ("It is a well-known axiom of administrative law that 'if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum'"); *Universal Health Servs. v. Thompson*, 363 F.3d 1013, 1019-21 (9th Cir. 2004) (finding that there were no exceptional circumstances to excuse the plaintiffs' failure to raise arguments in administrative proceedings and that they therefore waived those arguments).

[124] *Amigos Bravos v. Molycorp, Inc.*, No. 97-2327, 1998 WL 792159, at *4 (10th Cir. Nov. 13, 1998) (unpublished).

[125] EPA's regulations define "Director" as "the Regional Administrator or the State Director, as the context requires, or an authorized representative." 40 C.F.R. § 122.2.

[126] 40 C.F.R. § 122.28(b)(3)(i) (emphasis added). That provision sets forth circumstances where an individual permit may be required, *e.g.*, where "[c]ircumstances have changed since the time

(continued…)

It is uncontroverted that Plaintiffs did not petition EPA to require an individual permit.[128] Instead, Plaintiffs now seek this Court's intervention in a subject that is plainly committed to the discretion and expertise of the agency. To the extent that Plaintiffs are asking this Court to determine that EPA erred in permitting coal sediment discharges from the conveyor under the General Permit, and that an individual permit is required for any such discharges, Plaintiffs must first have sought that remedy in administrative proceedings and then brought judicial action against EPA.

This Court is not the proper forum for Plaintiffs to challenge EPA's choice to allow operation of the Seward Terminal under the General Permit, as opposed to an individual permit. Plaintiffs must first seek an administrative ruling requiring AES to obtain an individual permit and cannot bypass that prescribed administrative procedure through use of the citizen suit provision.[129] Whether this Court views this as a matter of statutory exhaustion, primary jurisdiction, prudential exhaustion, waiver, or some other legal doctrine is not important. The key principle is that the administrative agency is in a better position than this Court to apply its expertise and build an administrative record in addressing Plaintiffs' grievances regarding whether the General Permit is the correct permit for conveyor discharges.[130] This Court should therefore decline to exercise jurisdiction over Plaintiffs' first claim and direct Plaintiffs to file a petition first with the agency under 40 C.F.R. § 122.28.

(continued…)
of the request to be covered so that the discharger is no longer appropriately controlled under the general permit." *Id.*

[127] *See* Ashbaugh Decl., Ex. M (General Permit) at 16, ARRC0018751.

[128] *See* Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 31:14-20 (Q. Was there ever a point in time when the Sierra Club objected to coverage of the Seward terminal with a general permit? A. Not to my knowledge. Q. Ever a time when the Sierra Club objected to the language in the Stormwater Plan? A. Not to my knowledge.); Ex. HH (ACAT Dep.) at 26:25-27:5 (Q. Do you know—did ACAT ever object to coverage under the General Permit? A. No. Q. Did you ever object to language of the Stormwater Plan? A. No.).

[129] *See Amigos Bravos*, 1998 WL 792159 at *4.

[130] *See McKart v. United States*, 395 U.S. 185, 194 (1969).

D. Plaintiffs' Claims for Injunctive Relief on Coal Sediment Discharges are Moot.

Even assuming Plaintiffs could somehow evade the Clean Water Act's permit shield, and even assuming this Court would allow Plaintiffs to proceed against Defendants without having petitioned the regulatory agencies, Plaintiffs' claim for an injunction against discharge of coal sediment from the conveyor is moot.

Article III of the Constitution limits federal court jurisdiction to actual cases or controversies.[131] An "actual controversy must be extant at all stages of review"; otherwise, the claim must be dismissed as moot.[132] Put differently, mootness asks "whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties."[133]

Plaintiffs' expert recommends the following control measures: (i) installation of drip pans below the conveyors; (ii) seals/skirting along the end of the conveyors; (iii) scrapers on the conveyors; (iv) enclosures at transfer points; (v) clean-up of spillage; and (vi) monitoring and recordkeeping. Yet Defendants have implemented all of these measures in coordination with DEC.[134]

Moreover, these controls have been integrated into the General Permit through the revised Stormwater Plan for the Seward Terminal.[135] Thus, each of the control measures that Defendants are employing on the conveyor is now an enforceable requirement rather than a

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[131] *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 395-96 (1980) (citing *Flast v. Cohen,* 392 U.S. 83, 95 (1968)).

[132] *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997); *Alvarez v. Hill*, 667 F.3d 1061, 1063 (9th Cir. 2012).

[133] *Williams v. I.N.S.,* 795 F.2d 738, 741 (9th Cir. 1986) (quoting 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533, at 212 (2d ed. 1984)).

[134] *Compare* Ashbaugh Decl., Ex. JJ (Klafka Report) at 35 *with* Ex. PP (June 18, 2010 letter from AES to DEC); Ashbaugh Decl., Ex. K (Current Stormwater Plan) at 15-17, 26-28, 34-35; AESPROD00022809-11, AESPROD00022820-22, AESPROD00022828-29 (incorporating control measures into the current Stormwater Plan).

[135] The [Stormwater Plan] implements the [General Permit] and is an enforceable permit requirement." Kent Decl., ¶ 7.

voluntary measure. Plaintiffs do not contend that Defendants have violated the General Permit,[136] and Defendants have demonstrated no intent to do so in the future.

Finally, DEC has stated that whether coal sediment discharges from the conveyor were covered by a general or individual permit, "[b]oth would require implementation of reasonable measures designed to limit discharges of coal."[137] This is not surprising, since EPA's permit-drafting regulations require the agency to impose "best management practices (BMPs)" to control discharges of pollutants when, as here, "numeric effluent limitations are infeasible."[138] Put differently, if this Court granted the injunctive relief sought by Plaintiffs under their first claim, the parties to this lawsuit would be in the same functional position that they are today.

III. THE SEWARD TERMINAL DOES NOT REQUIRE A CLEAN WATER ACT PERMIT FOR WIND-BORNE MIGRATION OF DUST PARTICLES.

Plaintiffs' own expert on dust emissions, Steven Klafka, testifies to a fundamental regulatory truism: "coal dust emission is regulated as an air pollution."[139] Indeed, Mr. Klafka, in over 30 years of environmental regulatory work, has never heard of wind-borne dust being addressed under the Clean Water Act. [140] Nor has he ever advised a client to obtain a NPDES permit to address dust.[141] Defendants' dust emissions expert concurs with Mr. Klafka on this point.[142] Nevertheless, Plaintiffs argue that the Seward Terminal must have a Clean Water Act permit to cover dust because some of that dust may eventually make its way to Resurrection Bay.

DEC and EPA concur with both parties' experts that no Clean Water Act permit is required for wind-borne dust, and both agree that such emissions are appropriately addressed

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[136] *See* Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 23:14-17; Ex. HH (ACAT Dep.) at 25:17-21.

[137] Kent Decl., ¶ 10.

[138] 40 C.F.R. § 122.44(k); *see also* 18 AAC 83.475.

[139] Ashbaugh Decl., Ex. N (Klafka Dep.) at 59:7-10 (sic).

[140] *Id.*, Ex. N (Klafka Dep.) at 132:11-21.

[141] *Id*. at 134:8-12.

[142] *See* Ashbaugh Decl., Ex. MM (Winges Report) at 5 ("My opinion is that this is an air quality issue, not a water quality issue. It is appropriately addressed through air quality rules, regulations and permits and is administered by air quality regulatory agencies.").

under Alaska air regulations. Given their Congressional mandate to implement these statutes, the agencies' conclusions are entitled to deference. More fundamentally, the statute and case law confirm that the agencies' position is correct: wind-borne dust from the Seward Terminal does not constitute a point source discharge subject to NPDES permitting requirements. Defendants are thus entitled to summary judgment on Plaintiffs' second claim.

Defendants are also entitled to summary judgment on the independent basis discussed previously, that the Clean Water Act provides a permit shield defense. The General Permit and Stormwater Plan already contain measures to minimize dust that are sufficient to satisfy Clean Water Act requirements – not because the Clean Water Act applies to airborne dust, but rather because dust could migrate via stormwater. Nevertheless, while those requirements are in place to address dust emissions via stormwater, they provide the incidental benefit of protecting against wind-borne migration of dust. Because the regulating agency both knew of the dust emissions at issue *and* acknowledged the General Permit's and Stormwater Plan's coverage of these emissions, the Clean Water Act's "permit shield" provision prohibits liability.[143]

Lastly, Plaintiffs' second claim is moot because the Compliance Order mandates all appropriate dust control measures determined by DEC to satisfy applicable standards, and required Defendants to pay a substantial penalty covering past dust emissions. Even if the regulatory regimes were rewritten to require an additional Clean Water Act permit, that permit could only reiterate requirements already applicable to the Seward Terminal under the existing Compliance Order and the General Permit.[144]

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[143] *See* Kent Decl., ¶ 7 ("[T]he MSGP (NPDES permit) for stormwater does contemplate that dust could reach a water of the United States and requires (at section 2.1.2.12) that facilities minimize dust generation. This and other best management practices are documented in the Seward Terminal's Stormwater Pollution Prevention Plan (SWPPP) prepared by Aurora Energy Services, LLC (AES)."); Edwards Decl., ¶ 11 ("ADEC believes that the SOPs and other control mechanisms and requirements of the Compliance Order (1) establish reasonable precautions for airborne dust emissions from the Seward Terminal; (b) protect human health and the environment; and (c) comply with applicable law governing airborne dust emissions from the Seward Coal Terminal.").

[144] Kent Decl., ¶ 7.

A. DEC and EPA Regulate Windblown Dust Emissions from the Seward Terminal Under the Clean Air Act, Not Under the Clean Water Act.

Both DEC and EPA have examined the issue of wind-borne dust at the Seward Terminal. Neither found that an individual permit under the Clean Water Act is required. DEC has directly addressed the question of whether the Seward Terminal should have an individual permit under the Clean Water Act for wind-borne dust emissions. As DEC's Deputy Commissioner has attested, such emissions are regulated under the State's implementation of the Clean Air Act, not the Clean Water Act.[145] Similarly, EPA concluded that Defendants were already employing the appropriate measures to address wind-borne dust emissions under Alaska's Clean Air Act State Implementation Plan regulations, and no other regulatory action was appropriate. The regulatory authorities' conclusions interpreting the Clean Water Act and Clean Air Act are entitled to deference.

1. DEC Has Not Required a Water Discharge Permit for Wind-Borne Dust Emissions.

DEC "generally does not regulate emissions to air under its Clean Water Act authority[.]"[146] As a consequence, and having specifically examined the Seward Terminal, DEC has concluded that no permit for wind-borne dust is required.[147] Indeed, DEC's Deputy Commissioner expressly testified that when she was Director of the Division of Water, she did not believe that a further Clean Water Act permit was required for dust emissions from the facility—nor does she believe that such a permit is required now.[148] Instead, "[]DEC Division of

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[145] *Id.*

[146] Kent Decl., ¶ 7.

[147] Kent Decl., ¶ 12.

[148] Kent Decl., ¶¶ 11-12 ("While I was Director of the Division of Water I did not believe that a separate NPDES/APDES permit (general or individual), aside from the MSGP, was required for coal discharges or fugitive dust emissions from the coal storage areas, equipment, or other locations at the Seward Terminal that may end up in waters of the United States . . . I still believe that, for purposes of the NPDES/APDES program under the CWA, no other permit, other than the MSGP, is required.").

Air Quality regulates emissions of coal dust at the Seward facility under its regulations addressing airborne dust, as part of the State's clean air regulatory program."[149]

Consistent with this interpretation, DEC has repeatedly declined to require an individual permit for wind-borne dust emissions or to find a violation of the Clean Water Act when called upon to look into dust emissions at the Seward Terminal. For example, in December 2008, the DEC Division of Water inspected the facility specifically "to respond to a concerned citizen complaint regarding coal dust release and settling that may potentially be affecting water quality."[150] The inspection report describes DEC's observations, includes a discussion of the dust control measures then employed by the facility, and finds no permitting violations.[151] After this action was filed, in February 2010, the Division of Water conducted another routine inspection of the facility under its Clean Water authority, and again the agency considered the dust issue.[152] While the Division of Water identified some areas for improvement, again no violations were cited, and no additional permits were demanded.[153]

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[149] Edwards Decl., ¶ 8; *see also* Ashbaugh Decl., Ex. Z (March 25, 2009 email from Alice Edwards to Russ Maddox) ("[T]he Alaska Railroad coal stockpile is not subject to permitting under DEC or EPA regulations.").

[150] Ashbaugh Decl., Ex. KK (December 30, 2008 APDES Inspection Report) at 1, SOA000850.

[151] *Id*. (December 30, 2008 APDES Inspection Report).

[152] Ashbaugh Decl., Ex. BB (February 19, 2010 APDES Inspection Report) at 3, ARRC00009891.

[153] *Id*. (February 19, 2010 APDES Inspection Report). Plaintiffs do not dispute that while applicable air regulations require the facility to take appropriate measures to mitigate fugitive dust releases, DEC does not impose a "zero emissions" requirement. *See* Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 41:24-25, 42:3-10; Ex. J (Maddox Dep.) at 79-80; *see also, e.g.,* Ex. LL (April 27, 2010 email from Sean Lowther to Russ Maddox) ("The regulations do not have a zero dust requirement, yet [the facility has] made huge strides to get there."); Edwards Decl., ¶ 12 ("Neither regulatory requirements … nor DEC's requirements under the Compliance Order mandate 'zero discharge' from the Seward Terminal."). In fact, as Plaintiffs' expert implies, so stringent a standard would be a practically impossible one for any coal loading facility. *See* Ashbaugh Decl., Ex. N (Klafka Dep.) at 15:9-11 ("[E]ven without any observations [of dust] one would assume that coal dust would leave the facility."); *see also* Ex. N (Klafka Dep.) at 13:16-17 ("Q Okay. But you couldn't reach zero emissions? A: Practically, probably not.").

2. EPA Has Not Required a Water Discharge Permit for Wind-Borne Dust Emissions.

EPA likewise has not required the Seward Terminal to obtain an individual permit under the Clean Water Act. Like DEC, EPA regulates wind-borne dust pursuant to its Clean Air Act authority.[154] A December 2006 letter from EPA to Senator Ted Stevens responding to concerns about the Seward Terminal reflects EPA's understanding that dust is properly regulated under Alaska clean air regulations.[155] EPA explained that the state requires "reasonable precautions" – a standard for which EPA defers to DEC.[156] EPA did *not*, however, identify any similarly applicable standard under federal or state water pollution law, much less any Clean Water Act permitting requirement.

This interpretation is consistent with EPA's decision not to participate in the present action in response to Plaintiffs' notice letter. It is also consistent with EPA's August 2011 inspection of the Seward Terminal, which addressed both air emissions and water discharges. In its September 2011 reports on those inspections (which included aerial diagrams and photos depicting the conveyor/shiploader and loading dock), EPA never suggested that additional permitting is required.[157] The air compliance report reflects EPA's focus on preventing wind-borne dust, and ultimately indicates that the facility is acting precisely as it should.[158] EPA

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[154] *See, e.g.*, EPA Office of Air and Waste Management, *Fugitive Dust Policy: SIP's and New Source Review* (1977), http://www.epa.gov/ttn/caaa/t1/memoranda/19770816_tuerk.pdf (providing guidance on EPA policy as to fugitive dust control and applicable new source review requirements under Clean Air Act).

[155] *See* Ashbaugh Decl., Ex. S (December 13, 2006 letter from EPA to Senator Ted Stevens).

[156] *Id*. (December 13, 2006 letter from EPA to Senator Ted Stevens).

[157] *See generally* Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report); Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report).

[158] Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report) at ACAT003334 ("I had observed a variety of dust control measures that appeared to me to address all areas that I could seen [sic] needed dust control: water spray and/or water fogging bars at the coal pile and a number of conveyor belt locations; rubber flaps at the conveyor belt entry and exit points; scrapers at the conveyor belt turning points; wind screens on sides of belts; full top and side enclosures over BC-14, and drip pans beneath BC-14.").

found the facility in compliance with air regulations and noted that it "has undertaken a comprehensive approach to controlling dust from coal storage and handling."[159] Plaintiffs' expert agreed with this conclusion.[160] In the clean water compliance report issued on the same day, EPA specifically acknowledged the measures the facility has undertaken to minimize dust, and likewise had no Clean Water Act concerns.[161]

3. EPA's and DEC's Approach to Regulation of Wind-Borne Dust is Entitled to Judicial Deference.

DEC's regulation of wind-borne dust emission requirements under its Clean Air Act State Implementation Plan rather than under the Clean Water Act should be afforded substantial deference by this Court. The "view of the agency charged with administering [the CWA] is entitled to considerable deference; and to sustain it, [a court] need not find that it is the only permissible construction" that the agency might have adopted, but only that the agency's "understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]."[162]

Here, EPA's and DEC's regulatory approaches with respect to wind-borne coal easily satisfied the minimum requirement of rationality required to confer deference. As discussed in greater detail below, the agencies' approaches were fully consistent with the language of the statute and applicable case law, which limit the permitting requirement to discharges through a "discernable, confined and discrete conveyance[s]."[163] Wind-borne dust from coal piles does not

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[159] *Id*. (August 15, 2011 EPA Air Compliance Inspection Report) at 7, ACAT003335.

[160] Ashbaugh Decl., Ex. N (Klafka Dep.) at 71:12-15.

[161] Ashbaugh Decl., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report) at 7, AESPROD00022602 (noting the facility's use of 'water spray bars, sprinklers and fog sprayers at various points in the coal unloading building, storage piles and conveyor lines to prevent dust," and recognizing that "much of the conveyor line system is partially or fully enclosed").

[162] *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (citing *Train v. Natural Res. Def. Council*, 421 U.S. 60, 75, 87 (1975)); *see also Citizens for Clean Air*, 959 F.2d at 844.

[163] *See* 33 U.S.C. § 1362(14); Order at 17 (Docket #56) (citing *Trs. for Alaska v. E.P.A.*, 749 F.2d 549, 558).

fit that definition. The rationality of the agencies' action is buttressed by the fact that (i) wind-borne dust emissions such as these have never, to Plaintiffs' expert's knowledge, been permitted under the Clean Water Act; and (ii) DEC has at its disposal an air regulation unambiguously intended to cover such emissions.

B. The Clean Water Act Does Not Require the Seward Terminal to Have an Individual Permit for Wind-Borne Dust Because it Is Not A "Point Source" Discharge.

DEC's and EPA's conclusion that wind-borne coal dust at the Seward Terminal does not require a Clean Water Act permit is wholly consistent with that statute and the case law interpreting it. Plaintiffs' second claim rests on the premise that dust particles dispersed from the Seward Terminal by the wind—that may ultimately settle on a water body—constitute a point source discharge requiring a Clean Water Act permit.[164] Dust emissions of this sort, however, do not qualify as discharges from a "discernable, confined and discrete conveyance" to a water of the United States.[165] Thus, as DEC and EPA have already concluded, no Clean Water Act permit is required.

1. To Constitute a Point Source, A Discharge Must Be "Channelized," and Not Conveyed in a "Natural and Unimpeded" Manner.

Whether a discharge is from a point source turns on "whether the pollution ***reaches the water*** through a ***confined, discrete*** conveyance."[166] A pollutant stream must be "collected or channelized," and that channel must then convey the pollutant stream to the receiving water

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[164] Under 33 U.S.C. §§ 1311 and 1362(12), Plaintiffs must establish a discharge from a point source; *see also* Compl. at ¶¶ 61-63 (Docket #1); Order at 17 (Docket #56) (citing *Trs. for Alaska*, 749 F.2d at 558).

[165] *See* 33 U.S.C. § 1362(14) (defining "point source" as "any ***discernable, confined and discrete conveyance***, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.") (emphasis added).

[166] *Trs. for Alaska*, 749 F.2d at 558 (agreeing with *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979)) (emphasis added). *See also Nw. Envtl. Def. Ctr.v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011) (quoting *Trustees for Alaska*).

body.[167] "Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation."[168] By contrast, "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable,' confined and discrete conveyance' of pollutants, and there is therefore a discharge from a point source."[169] Here, wind dispersion of coal dust particles, some of which may make their attenuated way to Resurrection Bay, is not a discernable, confined and discrete conveyance.

2. Uncontrolled "Natural" Dispersion of Dust Particles Is Not a "Point Source" Discharge.

In considering whether pollutants are from a "point source," courts examine whether they are conveyed via natural forces or dissipation, or are instead subject to artificial forces or pathways that channel a pollutant stream. Here, no human or other organizing force creates a channelized conveyance of dust particles to Resurrection Bay. Instead, a natural force catches and then disperses a pollutant, rather than concentrating or channeling it, exemplifying non-point source pollution under the case law.

The Ninth Circuit's recent decision in *Northwest Environmental Defense Center v. Brown* articulates the distinction between channelized point source discharges and natural transport of pollutants. In examining stormwater discharges from logging roads, the court explained, "[s]tormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a ***natural and unimpeded*** manner, is not a discharge from a point source as defined

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[167] *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1070 ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source"); *see also Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

[168] *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 841-42 n.8 (9th Cir. 2003) (citing *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998)).

[169] *See, e.g.*, *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1071.

by § 502(14)."[170] Whether the discharge was a point or nonpoint source depended on "whether it is allowed to run off ***naturally*** (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge)."[171]

Ecological Rights Foundation v. Pacific Gas and Electric Co.[172] built on this distinction when it concluded that discharges of pollutants that leached from utility poles into surrounding groundwater, which then transported those pollutants to San Francisco Bay, were not point source discharges subject to Clean Water Act permitting. The court noted that "[u]nlike the logging roads at issue in *Brown* which were connected to a drainage system specifically designed and constructed to work the roads, the chemical pollutants are alleged to wash off the Poles and to eventually make their way to the San Francisco Bay through ***natural means*** that are separate and distinct from the Poles. ***That distinction is critical***."[173]

Coal dust particles, caught by the wind from various areas of the Seward Terminal and carried by unconstrained and undirected natural forces, do not constitute point source discharges, even if they eventually settle on Resurrection Bay or a more distant water body. Like the discharges in *Pacific Gas*, and unlike the discharges from the logging roads considered in *Brown*,

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[170] *See id*. at 1070 (emphasis added) (evaluating whether Clean Water Act permits were required for stormwater runoff from logging roads). *See also Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (9th Cir. 2010) (quoting *Brown*).

[171] *Id.* at 1071 (emphasis added). *See also Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.* ("*EPIC*"), 469 F. Supp. 2d 803, 821 (N.D. Cal. 2007). Citing a series of cases that involved a human action, construction or force that created the channelization required for a point source, the court in *EPIC* found that unpaved logging roads with "ditches and culverts like the ones EPIC alleges" could constitute a point source. *Id.* (citing *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir. 1980) ("surface runoff collected or channeled by the operator" constituted a point source)); *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999) ("stormwater collected and channeled by pipes and culverts" could be a point source); *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 821 ("the use of sumps and ditches to drain a mining operation" showed point sources) (citing *Earth Scis., Inc.*, 599 F.2d at 374).

[172] 803 F. Supp. 2d 1056, 1062-63 (N.D. Cal. 2011).

[173] *Id.* at 1063 (emphasis added).

this dust is in no way collected or channeled. Instead, the dust particles at issue here are caught by a "natural" force that "dissipates" them, with their route and ultimate resting place depending upon which way the wind is blowing. Such diffuse, attenuated, and naturally dissipating releases are not discharges from a point source.

3. Wind-borne dispersion and deposition of coal dust from the Seward Terminal is natural and unchannelized, and, therefore, not a point source discharge.

Plaintiffs here face a particular barrier in demonstrating the existence of a point source under the applicable case law, because Clean Water Act point source cases address discharges of stormwater or other waterborne discharges, while the claimed discharges challenged here involve wind-borne dust. Waterborne effluent, both by nature and in the way it is often managed, is far more readily channelized. Wind, on the other hand, does not by nature become "channelized," nor is it generally subjected to channelization by human forces so as to produce a discrete point source from which pollutants may emanate. Indeed, it would be difficult to identify a more proverbially undirected, unconstrained, or unchanneled means of conveyance.

a. Plaintiffs' expert and EPA's historic guidance confirm that wind-borne dust from the facility is not a point source.

Plaintiffs' own expert acknowledges that wind-borne dust is not a point source discharge. Mr. Klafka identifies dust from the facility as "fugitive emissions,"[174] and goes on to define "fugitive emission" as "an emission that's not contained or easily contained and so it is released in a broad area as opposed to a stack or a vent."[175] Mr. Klafka's characterization of dust from the Seward Terminal confirms that it is not discharge from a discernable, confined, discrete conveyance to a water of the United States.

Moreover, EPA, in its own guidance documents, agrees that atmospheric deposition cannot constitute a point source. In the EPA Office of Water's *Nonpoint Source Guidance*, the

[174] Ashbaugh Decl., Ex. JJ (Klafka Report) at 3 (describing purpose of the report as to "identify the AES operations which generate fugitive coal dust and coal spillage"); *see also* Ex. N (Klafka Dep.) at 11:1-6.

[175] *Id.*, Ex. N (Klafka Dep.) at 131:13-15.

agency recognized that "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, ***atmospheric deposition***, or percolation."[176] EPA reiterated its position in 2003 in its *Nonpoint Source Program and Grants Guidelines for States and Territories*, listing "atmospheric deposition" as a "source[] of nonpoint pollution."[177]

b. Case law addressing pollutants traveling through the air confirms that windborne fugitive dust from the Seward Terminal is not a point-source emission.

The limited case law addressing pollutants traveling through air confirms that fugitive dust from Seward Terminal does not qualify as a point source discharge. These cases fall into two general categories: (1) emissions from aerial spraying of pesticides; and (2) munitions. Neither category is comparable to wind-borne dust, because both involve controlled, forceful, human propulsion of the "pollutant" at issue, from a discrete conveyance, directed to a water body. Windborne dust from the Seward Terminal, by contrast is subject to no such channelization, human force or controlled direction. It thus does not qualify as point source pollution.

(1) Aerial spraying of pesticides

The aerial spraying of pesticides identified as point source discharges in the case law is distinct from emissions here because it involved forceful, intentional direction of a pollutant stream through a spraying apparatus, which both channelized the emission stream and directed it toward the receiving water body. In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, the Ninth Circuit held that aerial spraying of insecticides "directly above streams" and rivers could constitute a point source discharge subject to permitting requirements.[178] The court concluded that aircraft "spray these insecticides directly into rivers . . . [and] an airplane fitted with tanks and ***mechanical spraying apparatus*** is a

[176] EPA Office of Water, *Nonpoint Source Guidance* 3 (1987) (emphasis added).
[177] Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60,653, 60,655 (Oct. 23, 2003).
[178] 309 F.3d 1181, 1183, 1185 (9th Cir. 2002).

'discrete conveyance.' Therefore, all the elements of the definition of point source pollution are met."[179] Likewise, in *Peconic Baykeeper, Inc. v. Suffolk County*, the Second Circuit applied the point source definition to pesticide spraying from trucks and aircraft.[180] The record in that case revealed "instances of aerial spraying over creeks"[181] and the court determined that the active pesticide spraying constituted a point source discharge.[182] By contrast, the dust emissions alleged here are not directed or forced out through any particular spraying apparatus or other discrete conveyance that channelizes them. Instead, dust particles are caught by the wind and dissipate naturally, without channelization.

(2) Munitions

A comparison of two cases involving lead munitions further demonstrates why wind-borne dust from the coal piles should not be regulated as point source pollution. In *Cordiano v. Metacon Gun Club*,[183] the Second Circuit found that windblown lead dust from an earthen berm did not constitute a point source discharge because it did not demonstrate the requisite "channelization."[184] Despite the existence of a berm that provided a physical assemblage of spent lead shot (like areas of coal collection at the Seward Terminal),[185] and despite the fact that

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[179] *Id*. at 1185 (emphasis added).

[180] *See generally* 600 F.3d 180 (2d Cir. 2010).

[181] *Id*. at 187.

[182] *See also No Spray Coal., Inc. v. City of N.Y.*, No. 00 Civ. 5395 (GBD), 2005 WL 1354041, at *5 (S.D.N.Y. June 8, 2005) (insecticides sprayed over navigable waters from helicopters and trucks constituted discharge from a point source).

[183] 575 F.3d 199.

[184] *Cordiano* also involved allegations that lead from the berm migrating via the water pathway constituted a point source. The court also rejected these allegations on the basis that plaintiffs had not demonstrated a sufficiently confined and discrete conveyance of pollutants to constitute a point source. *See* 575 F.3d at 222-24.

[185] Indeed, the court in *Cordiano* specifically distinguished between the berm serving as a source or "container" for lead shot, and the berm constituting a sufficiently channelized conveyance to establish a point source. *See, e.g.*, 575 F.3d at 223 ("For even assuming the Metacon berm may be described as a 'container,' or 'conduit,' the record contains no evidence that it serves as a 'confined and discrete conveyance' of lead to jurisdictional wetlands by these routes.").

the facility had promoted the "disposal" of lead shot on the berm by directing customers to fire at the berm area, the wind that allegedly blew lead particles from the berm to a nearby wetland did not provide a "discernible, confined and discrete conveyance."[186] The court explained: "We also find that lead in the berm that migrates to jurisdictional wetlands as airborne dust does not constitute a discharge from a point source."[187] The lack of a point source discharge here is no different. As in *Cordiano*, the wind-borne dust from the coal piles indisputably arises from an unconstrained natural force picking up and dissipating particulate matter without the benefit of any channelized conveyance.

By contrast, *Stone v. Naperville Park District*[188] concerned customers shooting lead and clay targets directly into the water. The court in *Stone* ruled that a trap shooting range constituted a point source because the range "channel[ed]" lead shot, by way of target shooting, into a jurisdictional water.[189] The court noted, "[w]e believe that the trap shooting range as well as each firing station, constitutes a 'point source' as defined by the Act. The whole purpose of the facility is to 'discharge pollutants' in the form of lead shot and shattered clay targets."[190] By contrast, nothing about the Seward Terminal's operations is intended or designed to direct coal particles, via wind-borne emissions, to Resurrection Bay.

4. Collecting Source Material Does Not Create a Point Source.

Merely gathering source material like coal in one location does not establish the existence of a point source. The Ninth Circuit has specifically examined whether wastewater flows from collections of mining waste rock constitute point source discharges. The answer depends upon

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[186] *See* 575 F.3d at 224.

[187] *Id*. (internal citation omitted).

[188] 38 F. Supp. 2d 651, 655 (N.D. Ill. 1999).

[189] *Id.* at 655 ("The range 'channels' shooting by providing a facility at which individuals may shoot; it channels the discharge of pollutants by inviting individuals to come shoot at wind-borne clay targets that land in the water with lead shot that also lands in the water.").

[190] *Id*. *See also Romero Barcelo v. Brown*, 478 F. Supp. 646, 663-664 (D.P.R. 1979) (concluding that Navy's release or firing of ordnance from aircraft into U.S. waters constituted a discharge from a point source).

whether the wastewater flow is collected or channeled, or, instead, is allowed to dissipate naturally. In *Greater Yellowstone Coalition v. Lewis*,[191] the court distinguished between two types of stormwater from an area where mining waste rock was collected in pits. The first—water collected and channeled through a stormwater drainage to a discrete discharge point—was a point source. The second type of discharge consisted of water that seeped into pits containing waste rock, percolating through that material collecting contaminants, and eventually making its way into surface water.[192] The court ruled that this second discharge was ***not*** collected or channeled, and, consequently, was not a point source discharge.[193]

The Fifth Circuit reached a similar distinction in *Abston Construction*,[194] where discharges from mine spoil piles required channelization of a discharge and human participation in that channelization in order to constitute point sources. The court found that erosion from rainwater runoff was "facilitated by the acts of defendants of creating pits and spoil banks in the course of their mining operations."[195] The court's conclusion that these discharges constituted point source discharges tracked the government's "middle ground" interpretation that: "surface runoff ***collected or channeled by the operator*** constitutes a point source discharge. Simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge, ***absent some effort to change the surface, to direct the water flow or otherwise impede its progress***."[196] The court went on to explain that a point source could also be present where "miners ***design*** spoil piles" so that stormwater runoff was discharged through "ditches, gullies and similar conveyances."[197] Here,

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[191] 628 F.3d at 1153.

[192] *Id.* at 1153.

[193] *Id*. The logging roads in *Brown*, 640 F. 3d 1063 also provide an apt analogy to the collection of materials in a particular location: the mere fact that the road had been constructed and gathered pollutants there was insufficient to establish the existence of a point source. *Id.* at 1071.

[194] 620 F.2d 41.

[195] *Id.* at 44.

[196] *Id.* at 44-45 (emphasis added).

[197] *Id.* at 45 (emphasis added).

no such design or channelization is alleged: any wind-borne emissions are utterly incidental and unwanted, and are entirely dependent on uncontrollable natural forces.

Friends of Santé Fe County v. LAC Minerals, Inc.[198] also confirms this distinction, concluding that acid mine drainage seeps were not channelized sources of pollutants and did not constitute point sources:

> The seeps at issue here are apparently nothing more than points at which shallow subsurface water, carrying traces of AMD, emerges through the soil into the Arroyo. Rather than constituting human-originated or –derived point sources of pollutants, these seeps are more accurately described as carriers of water from the alluvium to the surface. Defendants had nothing to do with their creation. Although the overburden pile, as a human-made "discernible, confined and discrete conveyance," 33 U.S.C. § 1362(14), and the remediation system, as a human-designed circulation and containment system of "sumps, ditches, hoses and pumps," [citation omitted] readily constitute point sources [citation omitted], the seeps merely represent evidence that AMD has at some time in past entered subsurface waters, possibly from the overburden pile or the remediation system. In other words, the seepages are non-point source carriers of pollutants similar to stormwater, and are therefore not subject to the Act's permitting requirements.[199]

Each of these cases confirms that, because migration of dust particles from the Seward Terminal is not subject to human direction or conveyance, or otherwise channelized, it is not a point source discharge. Rather, such fugitive dust emissions are more appropriately analogous to unchannelized, natural "seepage" of wastewater from collected waste rock piles, and, thus, do not constitute point source discharges.

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[198] 892 F. Supp. 1333 (D.N.M. 1995).

[199] 892 F. Supp. at 1359. The court's discussion, in dicta, of whether ***direct*** discharges from the overburden and remediation system constituted point source discharges is not to the contrary, since those discharges involved a channelized pollutant stream. *See id*. at 1353 (indicating the issue was not joined because Defendants did not "appear to dispute" it). *See also Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308, 309 (9th Cir. 1993) (acid mine drainage came from point source where defendants had conceded that spillway and valve of dam and reservoir were "point sources").

5. If Plaintiffs' View Was Accepted, Virtually Every Air Emission Would Require a Clean Water Act Permit.

Much like the wind-borne dust itself, a ruling that these emissions constitute a point source would not be easily contained. A wholesale adoption of Plaintiffs' view could compel virtually every source of air emissions, regardless how diffuse, to obtain a Clean Water Act permit. As Defendants' expert stated:

> Virtually every water body on earth has dust continuously settling on its surface and Resurrection Bay is no different. Some coal dust as well as many other kinds of dust are at present and will continue to settle into Resurrection Bay …. Everyone who has every [sic] driven a car, used a fireplace or swept a driveway in Seward has also produced dust emissions, some of which have settled in the Bay.[200]

The same could be said for the use of sand, salt, and gravel along highways, roads, and parking areas by cities, towns, and businesses across the country, as well as agricultural activities, storage of any particulate raw materials, street cleaning, sanding and woodworking, sandblasting, spray painting, and many other activities that produce dust and are not currently subject to Clean Water Act permitting requirements for that dust. If Defendants have violated the Clean Water Act by maintaining coal stockpiles and other operations that generate dust, then so too have the myriad others whose activities have in any way created dust that could end up in waters subject to the Clean Water Act. Indeed, if wind-borne dust from a coal pile is a point source discharge, so is every particulate emission from a smokestack that may eventually come to rest on a water body.

The Second Circuit was animated by similar concerns in *Cordiano*, fearing that characterizing lead dust from the shooting range berms as a point source "would imply that runoff or windblown pollutants from any identifiable source, whether channeled or not, are subject to the [Clean Water Act] permit requirement."[201] As in *Cordiano*, "[s]uch a construction

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[200] Ashbaugh Decl., Ex. MM (Winges Report) at 4-5.

[201] *Cordiano*, 575 F.3d at 224.

would eviscerate the point source requirement and undo Congress's choice" to distinguish between sources of pollution.[202]

C. Even if the Wind-Borne Dust Were from a Point Source, this Claim Would Be Rejected.

1. Wind-Borne Dust Emissions from the Facility Are Addressed Under the General Permit and the Stormwater Plan.

Even if wind-borne dust emissions required Clean Water Act permitting, those emissions are addressed under the facility's General Permit. As discussed above, those emissions are (i) known to permitting authorities;[203] and (ii) expressly acknowledged and addressed through the General Permit. Thus, Defendants are shielded from Clean Water Act liability.[204]

Not only is DEC aware of dust emissions at the Seward Terminal, but the agency considers those emissions appropriately addressed by existing requirements, including the provisions of the General Permit and the Stormwater Plan. DEC has expressly acknowledged the General Permit's overlapping coverage of dust:

> [T]he MSGP (NPDES permit) for stormwater does contemplate that dust could reach a water of the United States and requires (at section 2.1.2.12) that facilities minimize dust generation. This and other best management practices are documented in the Seward Terminal's Stormwater Pollution

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[202] *Id*.

[203] In this case, migration of dust to Resurrection Bay was more than "reasonably anticipated by, or within the reasonable contemplation of the permitting authority." *Piney Run Pres. Assoc.*, 268 F.3d at 268-69. EPA and DEC have long known about coal dust at the facility, including the possibility that some dust may occasionally enter the bay. *See* Sections III(A)(1) and III(A)(2), *supra*.

[204] *See* 33 U.S.C. § 1342(k) ("Compliance with a permit issued pursuant to this sections shall be deemed compliance, for purposes of section 1319 and 1365 of this title, with section 1311 …."); *Piney Run Pres. Ass'n*, 268 F.3d at 269 ("[A]ll discharges adequately disclosed to the permitting authority are within the scope of the permit's protection."); *see also* Section II(A) *supra* (discussing applicability of the permit shield to coal sediment discharged from the Seward Terminal conveyor).

> Prevention Plan (SWPPP) prepared by Aurora Energy Services LLC (AES).[205]

The existing General Permit thus provides a complete shield against Plaintiffs' claims.

2. Because Wind-Borne Air Emissions From the Coal Piles Were Regulated Under the Compliance Order, Plaintiffs' Claim is Moot.

Regardless of whether wind-borne dust from the Seward Terminal requires a Clean Water Act permit, Plaintiffs' claims for both injunctive relief and penalties are moot because (i) DEC brought an enforcement action which imposed dust emissions controls and civil penalties after Plaintiffs filed this action; and (ii) Plaintiffs have not demonstrated that there is a "realistic prospect" of future violations. Moreover, there would be no additional benefit to requiring a separate permit for wind-borne dust, since the controls which Defendants have put in place as a result of the Compliance Order are "comprehensive"[206] and there is no zero emissions requirement for wind-borne dust.

When a party's compliance has been compelled by a government enforcement action and a settlement entered subsequent to filing of a citizen suit, the citizen suit should be mooted unless the citizen plaintiff can prove that there is a "realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree."[207] "The 'realistic prospect' test

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[205] Kent Decl., ¶ 7. *See also* Kent Decl., ¶ 11 ("the current activities or facilities from which these . . . emissions originate are regulated under the [General Permit] and described in the [Stormwater Plan]."). The Stormwater Plan, which is incorporated into the General Permit, contains a section entitled "Dust Generation and Vehicle Tracking of Industrial Materials." This section states: "The facility uses dust control sprinklers and spray bars to suppress dust during operations. ***Dust suppression minimizes off-site migration of coal***." (Emphasis added.).

[206] Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report) at 8, ACAT003335; Ex. N (Klafka Dep.) at 71:12-15 (Q: You agree with [EPA] that . . . [AES has] instituted a comprehensive approach to controlling dust? A: Yes.).

[207] *See, e.g., Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008); *see also Atl. States Legal Found., Inc. v. Eastman Kodak, Co*., 933 F.2d 124, 127 (2d Cir. 1991); *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998). The standard for evaluating mootness in the context of a subsequent enforcement action appears to be a question of first impression in this Court and in the Ninth Circuit. It is entirely appropriate, however, for this Court to adopt the test used in the Second, Fifth and Eighth Circuits.

considers whether violations will 'continue' in the sense that the violations will not be cured even after the remedial plan imposed by the consent decree has been fully implemented in accordance with reasonable timetables."[208] If no such showing is made, any request for injunctive relief is rendered moot. The imposition of civil penalties in a consent decree will also moot claims for similar penalties in a citizen suit.[209]

Defendants entered into the Compliance Order with DEC on April 26, 2010, pursuant to DEC's clean air enforcement authority and approximately four months after Plaintiffs filed their complaint.[210] Under the terms of the Compliance Order, and as noted in the Statement of Facts *supra*, Defendants implemented an array of procedures and measures designed to mitigate the circulation of coal dust. The Compliance Order also required Defendants to pay a civil penalty of $213,942.00 for past violations, which was reduced to $48,885.00 upon performance of the SEPs.[211]

Although the Compliance Order enforces Alaska's air regulations, it addresses precisely the same wind-borne dust emissions that Plaintiffs seek to regulate under the Clean Water Act. DEC "believes that the SOPs and other control mechanisms and requirements of the Compliance Order . . . comply with applicable law governing airborne dust emissions from the Seward Coal Terminal."[212] The Sierra Club found no fault with the Compliance Order and agreed that it was "a resolution of the air emissions" issue,[213] and ACAT apparently agrees.[214]

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[208] *City of Dallas*, 529 F.3d at 530.

[209] *Id.*

[210] *See generally* Ashbaugh Decl., Ex. T (Compliance Order).

[211] *Id*. at 12, 71-76; ARRC00012320, ARRC00012379-84 (Compliance Order at ¶ 31, Exhibit 4). The penalty amount represented "the reasonable compensation to the State for the alleged violations; the economic benefit or savings realized by ARRC by delaying installation of appropriate coal dust emission controls; and an assessment of the gravity of the alleged violations[.]" *Id.*

[212] Edwards Decl., ¶ 11; *see also id.* at ¶ 13) ("Based on inspections of the facility and the other information available to it, []DEC is not aware of any current air quality violations, of the Compliance Order or of applicable requirements pertaining to potential emissions of airborne dust from the facility."); Ex. Z (March 25, 2009 email from Alice Edwards to Russ Maddox)

(continued…)

Moreover, Plaintiffs have produced no evidence that the dust control measures Defendants have adopted pursuant to the Compliance Order differ materially from what would be required if Plaintiffs prevailed and dust were subject to an individual permit. DEC does not impose a "zero emissions" requirement for such emissions.[215] Even Plaintiffs' expert on dust admits that it is "practically" impossible for a coal loading facility to reach zero emissions.[216] EPA has described the facility's effort as "a comprehensive approach to controlling dust from coal storage and handling."[217] Plaintiffs' own expert on dust emissions agrees.[218] And as noted

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(continued…)
("[P]ractices include sprinklers for use on the coal stockpile, spray bars at various points in the handling system, skirting along moving machinery, improving drop point heights, freeze protection for the spray bars to ensure they always can operate in cold conditions, and they even shut down operations when these other operational measures do not work. In DEC's review, if followed strictly, *these types of actions seem to be reasonable measures for this operation*.") (emphasis added).

[213] Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 45:21-46:7.

[214] Ashbaugh Decl., Ex. HH (ACAT Dep.) at 51:15-19 (Q: [A]nd you don't know whether or not ACAT has objected to these standard … operating procedures? A: We have not.); 56:7-10 (Q: [A]s we sit here today, it's fair to say that you don't have an objection to [the] methodology [used to determine fugitive emissions under the Compliance Order]; is that right? A: I don't have an objection to it.); 53:17-20 (Q: As you sit here today, does ACAT have any objection to DEC's conclusion in paragraph 31(a) of this compliance order [relating to the imposition of penalties]? A: I don't have an objection.).

[215] *See* Edwards Decl., ¶ 12 ("Neither regulatory requirements … nor ADEC's requirements under the Compliance Order mandate 'zero discharge' from the Seward Terminal."); *see also, e.g.,* Ashbaugh Decl., Ex. LL (April 27, 2010 email from Sean Lowther to Russ Maddox) ("The regulations do not have a zero dust requirement, yet [the facility has] made huge strides to get there.").

[216] Ashbaugh Decl., Ex. N (Klafka Dep.) at 13:13-17 (Q: In your opinion is it possible to have zero emissions from a coal loading facility? A: You could come close. Q: Okay. But you couldn't reach zero emissions? A: Practically, probably not.).

[217] Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report) at 8, ACAT003335.

[218] Ashbaugh Decl., Ex. N (Klafka Dep.) at 71:12-15; *see also id.* at 63:12-19 (concurring that DEC requires no additional measures so long as it considers the "reasonable precautions"

(continued…)

in Section II(D) *supra*, EPA's permit-drafting regulations obligate the agency to impose best management practices when, as here, "numeric effluent limitations are infeasible."[219] A hypothetical individual permit would almost certainly require the same comprehensive and flexible approach to dust control that DEC has already mandated.[220]

Additionally, Plaintiffs cannot demonstrate that there is a "realistic prospect" Defendants will violate the Compliance Order and/or cease to undertake a "comprehensive approach" to controlling wind-borne dust emissions. Mere evidence of past environmental violations is insufficient; rather, Plaintiffs would need to demonstrate that Defendants have a "poor 'track record for complying with [state agency] compliance orders'"[221] or have been in violation of the Compliance Order.[222] Plaintiffs have presented no such evidence.[223] DEC has also opined that Defendants are "working above and beyond reasonable to find additional extra options to

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(continued…)
standard to have been met); 152:20-153:24 (conceding no knowledge of the extent of any qualitative or quantitative difference in emissions to be gained from his own recommendations).

[219] 40 C.F.R. § 122.44(k); *see also* 18 AAC 83.475.

[220] EPA's Guidance Manual for Developing Best Management Practices, EPA 833-B-93-004 (October 1993) advises that BMPs are intended to be "flexible" and notes: "Many different practices can be used to achieve similar environmentally protective results. With facility-specific considerations as the major consideration in selecting appropriate BMPs, this flexibility allows a facility to tailor a BMP plan to meet its needs using the capabilities and resources available." *Id.* § 2.2.2.

[221] *City of Dallas*, 529 F.3d at 529 (citing *Orange Env't, Inc. v. Cnty. of Orange,* 860 F. Supp. 1003, 1019 (S.D.N.Y. 1994)).

[222] *Eastman Kodak*, 933 F.2d at 128.

[223] The absence of evidence of violation of the Compliance Order is particularly compelling given that Defendants have been monitored by a local member of the plaintiff organizations who reports frequently and regularly to EPA and DEC. *See, e.g.*, Ashbaugh Decl., Ex. J (Maddox Dep.) at 134:9-135:13 (discussing frequency of contact with EPA and DEC regarding Defendants' facility); 102:1-106:5 (discussing installation of web camera pointed at Defendants' facility).

minimize all dust,"[224] and even ACAT acknowledges that Defendants have made "substantial improvement" in preventing wind-borne dust emissions under the Compliance Order.[225]

Finally, because Defendants paid a civil fine under the Compliance Order, Plaintiffs' claim for penalties with respect to wind-borne dust emissions is also moot.[226] DEC initiated its own enforcement action and extracted civil penalties from Defendants at its discretion. The fact that Plaintiffs may wish to seek higher penalties does not change the result. As the Fifth Circuit noted in *City of Dallas*, "[t]he appropriate government agencies have exercised their discretion to extract some penalties from the City and forego others. By proceeding with its citizen suit, [plaintiff] could accomplish nothing other than to revisit the government's 'dispositive administrative settlement.'"[227]

Ultimately, the most Plaintiffs can say is that they want more than the regulators thought was sufficient. As one court has noted, however, "the fact that the remediation order [] does not meet the desires of the private parties is not crucial" to a mootness analysis.[228] The "thrust of the CWA is to provide *society* with a remedy against polluters in the interest of protecting the

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[224] Ashbaugh Decl., Ex. LL (April 27, 2010 email from Sean Lowther to Russ Maddox); *see also* Ex. Z (March 25, 2009 email from Alice Edwards to Russ Maddox and others) ("[P]ractices include sprinklers for use on the coal stockpile, spray bars at various points in the handling system, skirting along moving machinery, improving drop heights, freeze protection for the spray bars to ensure they always operate in cold conditions, and they even shut down operations when these other operational measures do not work. In DEC's review, if followed strictly, these types of actions seem to be reasonable measures for this operation.").

[225] Ashbaugh Decl., Ex. HH (ACAT Dep.) at 47:13-15.

[226] As Plaintiffs are assuming the role of private attorneys general, any penalty that they seek would be paid to the government. *See City of Dallas*, 529 F.3d at 530-31.

[227] *Id.* at 531 (citing *Eastman Kodak,* 933 F.2d at 127); *see also* n. 211 *supra* (penalty amount constituted reasonable compensation to state, disgorgement of any economic benefit, and assessment of gravity).

[228] *County of Orange*, 923 F. Supp. at 539.

environment. If the government's action achieves that end, the fact that . . . any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh."[229]

IV. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM THAT COAL LADEN SNOW IS PLOWED INTO RESURRECTION BAY.

Plaintiffs' claims under the Clean Water Act regarding allegations of coal-laden snow being plowed into Resurrection Bay fail for two reasons: (i) any such alleged discharges are properly permitted by the General Permit and thus not properly before the Court in a citizen suit, and (ii) the factual allegations are unsupported.

A. The Seward Terminal's Dock is Covered by the General Permit.

Like Plaintiffs' other claims, their third claim calls for the Court to override EPA's and DEC's position that the General Permit is the appropriate permit for the Seward Terminal. The Court should not do so. The General Permit covers any alleged discharges from the coal loading dock which runs parallel to the conveyor over Resurrection Bay and is located within Drainage Area H.[230] Within Drainage Area H, the Stormwater Plan identifies "TSS from coal" as being a suspected pollutant that could discharge into Resurrection Bay.[231] In addition, the Stormwater Plan identifies the dock and ship loader together as an area where potential spills and leaks could occur into Resurrection Bay.[232] Thus, alleged discharges from the loading dock, including any alleged trace amounts of coal allegedly carried by snow being plowed to Resurrection Bay, are covered by the General Permit.[233]

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[229] *Id.* (quoting *Hudson River Fishermen's Ass'n v. Cnty. of Westchester*, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988)).

[230] Ashbaugh Decl., Ex. K (updated Stormwater Plan) at 51-54, ARRC00022845-48 (maps and diagrams showing location of the dock in relations to the conveyor and shiploader; Ex. L (Sierra Club Dep.) at 30:14 – 31:11.

[231] *Id.*, Ex. K (updated Stormwater Plan) at 15-16, ARRC00022809-10.

[232] *Id.* at 22, ARRC00022816.

[233] *See* 40 C.F.R. § 122.26(b)(14) ("Storm water discharge associated with industrial activity means the discharge from *any conveyance* that is used for collecting any conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.") (emphasis added).

Because the alleged discharges from the loading dock are covered under the General Permit, no violation of the statute has occurred.[234] Even if DEC and EPA both erred in permitting these discharges under the General Permit, the permit shields Defendants from this claim—for the reasons discussed in Section II(A)(3) *supra*.[235] As Plaintiffs have expressly stated that they are not alleging any violations pursuant to the General Permit, no cause of action is properly before the Court on the issue of whether coal was discharged into Resurrection Bay when snow was removed from the loading dock. Accordingly, Defendants are entitled to summary judgment Plaintiffs' third claim.[236]

B. Contrary to Plaintiffs' Conclusory Statements, No Snow, Much Less Coal-Laden Snow, is Plowed into the Bay.

Even if Plaintiffs could assert a legal claim regarding coal-laden snow, they fail to provide sufficient factual support to avoid summary judgment. As described above, in order to maintain a Clean Water Act citizen suit, a plaintiff must demonstrate "a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future."[237] A plaintiff "must prove that ongoing violations actually have occurred."[238] It is insufficient, to rely on proof of intermittent or sporadic violations where "there is *no real likelihood of repetition*."[239]

Plaintiffs cannot meet their burden of establishing that any plowing of coal-laden snow into Resurrection Bay is ongoing. Since at least 2007, the Seward Terminal has had a policy of

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[234] *See* 33 U.S.C. §§ 1311 (prohibiting unpermitted or otherwise unauthorized discharges), 1342 (providing for permitting).

[235] *See* 33 U.S.C. § 1342(k).

[236] Plaintiffs' claim regarding the coal-laden snow also fails because they did not exhaust their administrative remedies in requesting the Director to require an individual permit, as discussed in Section II(C), *supra*.

[237] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987); *Adams v. Teck Cominco Alaska, Inc.*, 414 F. Supp. 2d 925, 935 (D. Alaska 2006).

[238] *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000).

[239] *Id.*

removing snow on the dock and transporting it to another appropriate part of the facility.[240] In addition, AES forbids its employees from dumping coal into Resurrection Bay by any means.[241] These policies are strictly enforced, and if any employee were to violate the policy it would be grounds for termination.[242] As such, no snow, much less coal-laden snow, is pushed into Resurrection Bay.[243]

Plaintiffs' only support for their claim that this alleged conduct continues comes from their primary fact witness's comment that he saw an instance of plowing of snow from the dock into the Bay in November 2011.[244] No such event occurred. In fact, despite taking "tens of thousands" of photos of the Seward Terminal, maintaining a web-cam on the Seward Terminal (which also takes thousands of images from which the witness claims he can draw specific conclusions about operations of the Seward Terminal), allegedly receiving citizen complaints, and contacting DEC on a weekly basis, Plaintiffs' witness has no corroborating evidence to support his conclusory statement.[245] Although counsel for AES specifically requested documentation of communications with EPA or DEC complaining of this alleged event, no such

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[240] *See* Kleven Decl., ¶ 8; Brown Decl., ¶¶ 5-6. This policy was further emphasized by AES's Policy on Coal Entering the Water wherein there is a zero tolerance for any intentional dumping, shoveling or knocking coal into the water. Ashbaugh Decl., Ex. AA. Additionally, measures to minimize spillage onto the loading dock, including but not limited to, replacing scrapers to the convey system and shiploader and undertaking chute modification have been made. *See* Stoltz Decl., ¶¶ 6-9. Moreover, after each time a ship is loaded with coal, AES employees immediately clean up the loading dock area, and as a result any snow that would otherwise accumulate on the loading dock would be expected to contain minimal, if any, amounts of coal. *Id*.,¶ 13.

[241] Ashbaugh Decl., Ex. AA (Seward Coal Terminal Policy on Coal Entering the Water) at SOA000602.

[242] Brown Decl., ¶ 5.

[243] *Id.*

[244] Ashbaugh Decl., Ex. J (Maddox Dep.) at 128:22-129:11.

[245] *Id.* at 39:1 – 40:9. Plaintiffs' witness claims that he does not have such a photo because "his camera won't reach that far." *Id.* at 40:1-9. Yet, Plaintiffs' witness admits that the dock is just a few hundred yards away – a distance where any camera could capture an alleged front-loader pushing snow of the dock into Resurrection Bay.

documents were produced.[246] Finally, Plaintiffs' witness acknowledges that he has not observed and does not know whether there was any coal on the snow that he claims to have seen plowed into Resurrection Bay.[247]

The conclusory and completely unsubstantiated statement from Plaintiffs' witness cannot save their claim from dismissal on summary judgment. A factual issue is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[248] Federal courts, including the Ninth Circuit, have refused to find a "genuine issue" where the only evidence presented is "uncorroborated and self-serving" testimony.[249] As such, Plaintiffs' third claim fails both legally and factually.

V. CONCLUSION

For the reasons set forth, the Court should grant Defendants' motion and dismiss Plaintiffs' Complaint in its entirety with prejudice.

DATED at Anchorage, Alaska this 14th day of May 2012.

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[246] Ashbaugh Decl., Ex. U (Defendants' First Set of Requests for Productions), ¶¶ 7, 10; Ashbaugh Decl., Ex. J (Maddox Dep.) at 130:9-131:7; 132:11-17.

[247] *Id.*, Ex. J (Maddox Dep.) at 133:6-134:2.

[248] *Anderson,* 477 U.S. at 248.

[249] *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1061 (9th Cir. 2002) (finding that plaintiff in employment discrimination case failed to establish a genuine issue of fact when the only evidence she presented to contradict the employer's stated legitimate reason for the termination was her own self-serving testimony that was unsupported by any other evidence); *see also, e.g.*, *Vais Arms, Inc. v. Vais,* 383 F.3d 287, 294 (5th Cir. 2004) (concluding that self-serving statements were insufficient to overcome summary judgment, particularly when faced with "overwhelming evidence" in opposition); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001) (affirming summary judgment for the plaintiff when defendant's only evidence in opposition was his own "self-serving allegations").

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